STATE OF MICHIGAN

COURT OF APPEALS

TODD DAVIS,

Plaintiff-Appellee,

v

NINA MALCOLM,

Defendant,

and

AUTO CLUB GROUP INSURANCE,

Garnishee Defendant-Appellant.

UNPUBLISHED
February 11, 2000

No. 212689
Ingham Circuit Court
LC No. 96-083173-NO

Before: Hood, P.J., and Smolenski and Talbot, JJ.

PER CURIAM.

Garnishee defendant Auto Club Group Insurance (ACGI) appeals by right from an order granting plaintiff summary disposition pursuant to MCR 2.116(C)(9) and (10), based on a determination that, because plaintiff's allegations were grounded in negligence against defendant Nina Malcolm, ACGI's "criminal act" policy exclusion did not apply. We reverse.

This Court reviews decisions on motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 245; 590 NW2d 586 (1998). A motion for summary disposition pursuant to MCR 2.116(C)(9) seeks a determination whether the opposing party has failed to state a valid defense to the claim asserted against it. *Id.* It is tested by the pleadings alone, with the court taking all well-pleaded allegations as true and determining whether the defenses are so clearly untenable as a matter of law that no factual development could possibly deny the plaintiff's right to recovery. *Id.* at 245-246. In addition, the interpretation of contractual language is an issue of law that is reviewed de novo on appeal. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998).

ACGI argues that underage drinking was the gravamen of plaintiff's complaint. Because alcohol was provided at a party given by Elvis Malcolm, defendant's son, at defendant's residence, ACGI contends a criminal act occurred and coverage for plaintiff's injuries was excluded by the "criminal act" exclusion contained in defendant's homeowner's policy. We agree.

Exclusionary clauses are to be strictly construed against the insurer. *Fire Ins Exchange v Diehl*, 450 Mich 678, 687; 545 NW2d 602 (1996). Coverage under a policy is lost if any exclusion within the policy applies to an insured's particular claims. *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 565-567; 489 NW2d 431 (1992). "Clear and specific exclusions must be given effect. It is impossible to hold an insurance company liable for a risk it did not assume." *Id.* at 567. The pertinent exclusionary language contained in defendant's homeowner's policy stated:

> BODILY INJURY AND PROPERTY DAMAGE NOT COVERED
>
> Under Part II, we will not cover:
>
> * * *
>
> bodily injury or property damage resulting from:
>
> a criminal act or omission; or
>
> an act or omission, criminal in nature, committed by an insured person . . . .

An "insured person" under the policy meant:

> you;
> any resident relative; and
> any other person under the age of 21 residing in your household who is in your care or the care of a resident relative.

A "resident relative" was defined in the policy as:

> a person who is a resident of your household related to you by blood, marriage or adoption, or is your foster child. Resident relative also includes your unmarried child attending school away from home.

Although plaintiff argues that his allegations against defendant only pertained to a negligence theory and not to any criminal conduct, we must focus on the cause of plaintiff's injury and not his specific theory of liability. We have strongly disapproved of a plaintiff's attempting to trigger insurance coverage by characterizing allegations of tortious conduct under the guise of negligent activity. *State Farm Fire & Casualty Co v Moss*, 182 Mich App 559, 563; 452 NW2d 816 (1989). An insurer's duty to defend and indemnify does not depend solely on the terminology used in a plaintiff's pleading. See *Illinois Employers Ins of Wausau v Dragovich*, 139 Mich App 502, 507; 362 NW2d 767 (1984). Rather, it is necessary for us to focus on the basis for the injury and not the nomenclature of the

underlying claim in order to determine whether coverage exists. *Id.* The allegations must be examined to determine the substance, as opposed to the mere form, of the complaint. *Id.*

Here, plaintiff alleged that minors were provided with alcohol on defendant's premises. It is undisputed that plaintiff was assaulted by an intoxicated individual who had "been sold, furnished or given . . . alcohol on [defendant's] premises." Serving alcohol to a minor constitutes a criminal act causing a "criminal act" policy exclusion to apply. *Allstate Ins Co v Keillor,* 203 Mich App 36, 40; 511 NW2d 702 (1993); MCL 436.33; MSA 18.1004.[1]

Plaintiff contends that it was not defendant who furnished alcohol to minors on her premises, but that she was merely negligent in allowing this activity to occur. However, whether defendant or Elvis Malcolm, another insured under the homeowner's policy, actually furnished or supplied the alcohol at issue is not dispositive; alcohol was provided to minors on defendant's premises. This constituted a criminal act. Our review of ACGI's policy convinces us that the policy excludes not only bodily injury resulting from "an act or omission, criminal in nature, committed by an insured person," but also excludes bodily injury resulting from "a criminal act." The phrase "criminal act" cannot be considered ambiguous. See *Allstate Ins Co v Fick,* 226 Mich App 197, 203; 572 NW2d 265 (1997). We further conclude that the type of altercation and injury involving plaintiff could be reasonably expected to occur as a "natural, foreseeable, expected, and anticipated consequence" of the criminal act of providing alcohol to minors. See *Keillor, supra* at 40. Accordingly, we hold that ACGI's criminal act exclusion applied here. Because the criminal act exclusion precludes coverage on ACGI's policy, we need not address the issue of timely notice to and prejudice against ACGI.

Reversed.

/s/ Harold Hood
/s/ Michael R. Smolenski
/s/ Michael J. Talbot

[1] MCL 436.33; MSA 18.1004, in effect at the time of plaintiff's injuries, stated that:

> [A] person who knowingly sells or furnishes alcoholic liquor to a person who is less than 21 years of age, or who fails to make diligent inquiry as to whether the person is less than 21 years of age, is guilty of a misdemeanor.